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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matters of	)	
	)	
Imposition of Forfeiture Against	)	
	)	
Capitol Radiotelephone Inc. d.b.a. Capitol Paging Former Licensee of Station WNSX-646 in the Private Land Mobile Radio Services	)	PR Docket No. 93-231
	)	
and	)	
	)	
Revocation of Licenses of	)	
	)	
Capitol Radio Telephone Inc. d.b.a. Capitol Paging Licensee of Stations WNDA-400 and WNWW-636 in the Private Land Mobile Radio Services	)	
	)	
and	)	
	)	
Capitol Radiotelephone Company, Inc. Licensee of Stations KWU-373, KUS-223 and KWU-204 in the Public Mobile Radio Service	)	
	)	
and	)	
	)	
Capitol Radiotelephone Co., Inc. Licensee of Station KQD-614 in the Public Mobile Radio Service	)	

To: Administrative Law Judge Joseph Chachkin

PRIVATE RADIO BUREAU'S REPLY TO CAPITOL'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Summary

The record in this proceeding compels the revocation of all of Capitol's licenses and a $95,000 forfeiture. Capitol dreamed up, implemented and strove to cover up an illicit business plan of competition by radio interference. Nothing in Capitol's Proposed Findings of Fact and Conclusions of Law detracts from that conclusion. To the contrary, Capitol's misleading statements, misrepresentations, and preposterous arguments, if anything, bolster it.

Unable to shake the FCC engineers' testimony by any other means, Capitol resorts to misquoting the record. Capitol accuses the FCC of tilting toward RAM and backs up its argument that FCC engineer Walker should be given less credence, by misquoting him as saying he viewed Capitol as a "bad guy." Walker's actual testimony: "I can't say I viewed Capitol as the bad guy. I viewed RAM and Capitol as the bad guys."

Capitol continues to attempt to excuse its interference by accusing RAM of interference, but in doing so, exposes its own misrepresentations. Remarkably, Capitol adverts to its March 14, 1991, complaint to the FCC that RAM had been interfering with its newly inaugurated paging service since March 12. This only serves to draw attention to its June 17, 1992, representation to the FCC that Capitol's first customer signed up March 29 for service to begin April 1, 1991. The March 14 complaint was a misrepresentation and highlights Capitol's flexible attitude toward the truth.

Incredibly Capitol also argues that RAM's complaints justify

its interference. Standing logic, not to mention the FCC's Rules, on its head, Capitol argues that it was justified in not cooperating to resolve interference problems because of the complaints.

Seeking to put its own interpretation on the record, Capitol makes such laughable claims as: there is not "any serious dispute" that "the tone transmissions were bona fide test transmissions;" and strives mightily, if unsuccessfully, to back them up. The record shows that Capitol transmitted the tones hour after hour for days on end yet could not identify one single person who received the transmissions and no purpose for them. Capitol also attempts to rewrite the Communications Act's and the Commission's definition of "willful" in an attempt to extricate itself from responsibility for the consequences of the fake tests. The tones were interference, and Capitol's attempt to disguise them as tests is transparent and ultimately insulting.

The issues pertaining to operating violations seek to determine whether Capitol willfully or repeatedly committed the violations. The record shows that Capitol willfully committed the violations. It is also undeniable that the violations were repeated. Capitol is silent as to repetition, apparently hoping that this factor would escape notice. Aside from Capitol's willfulness, the repetition of each violation compels resolution of the issues against Capitol.

Capitol's interference and its misrepresentations are independent grounds for the most severe sanctions. Capitol's licenses should be revoked and $95,000 in forfeitures imposed.

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PRIVATE RADIO BUREAU'S REPLY TO CAPITOL'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Introduction

1. On April 8, 1994, Capitol[1] filed its Proposed Findings of Fact and Conclusions of Law (PFCs) in this proceeding. The Private Radio Bureau hereby replies to Capitol's PFCs. Our failure to reply to any particular finding or conclusion contained in Capitol's PFCs should not be construed as a concession to its accuracy or completeness. The Bureau submits that its own proposed findings of fact are an accurate and complete presentation of the relevant record evidence and that its conclusions of law properly apply Commission precedent in light of the record.

Discussion

2. It must be said at the outset that Capitol's PFCs contain a number of misleading, indeed fraudulent, statements. Capitol argues at ¶¶ 101 and 123 that FCC engineer James Walker should be given less credence because he "viewed Capitol as a 'bad guy[]'." Capitol tried unsuccessfully to have Walker espouse this view at the hearing. Capitol is now trying to make up for its unsuccessful attempt by mischaracterizing Walker's actual testimony: "I can't say I viewed Capitol as the bad guy. I viewed RAM and Capitol as the bad guys" (Tr. 1480).

3. Another example of Capitol's habit of misleading the

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[1] The above-captioned corporate licensees are collectively referred to as "Capitol."

Commission is at p. 4 of its PFCs. Capitol falsely implies that the Notice of Apparent Liability (NAL), or the engineers, stated that Capitol was conducting its operations "by the book, and for the most part, correctly." In fact, Capitol's own consultant, Peters, made the quoted statement (CAP Ex. 23, p. 14).

4. Additional instances of Capitol's ludicrous advocacy are equally misleading. Capitol claims at ¶ 83 that there is no serious dispute that the tone transmissions were *bona fide* tests. In fact, the idea that the tones were tests was disputed in many hours of testimony as summarized in the Bureau's Findings ¶¶ 20-27, 30-43 and 57; Conclusions ¶¶ 4-10, 13-16, 26-37 and 40; and Ultimate Conclusions ¶ 2. Capitol also claims, at ¶ 101, n. 14, that the "uncontradicted evidence" is that a single incident of the automatic testing program being left on all night was not willful or repeated. In fact this claim was affirmatively contradicted by the testimony of the FCC engineers and RAM employees that the tones originating from the autotest program went on around the clock for days, as recounted in the Bureau's Findings ¶¶ 20-21 and 57 and Conclusions ¶¶ 4 and 40.

5. The issues pertaining to operating violations (issues a, b, d, e, f and g) ask whether Capitol willfully and/or repeatedly (emphasis added)[2] committed the acts or omissions that constitute

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[2] The Commission adopted the Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing (HDO), 8 FCC Rcd 6300 (1993), pursuant to, *inter alia*, Section 312(a)(4) of the Communications Act of 1934, as amended, which authorizes the Commission to revoke licenses "for willful or repeated violation of" the Act or any Commission Rule and Section 503(b), which authorizes the Commission to impose a forfeiture on a licensee which "willfully or repeatedly failed to comply with" the Act or any Rule (emphasis added).

the violations. Pursuant to Section 312(f)(2) of the Communications Act, "[t]he term 'repeated,' when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day." Insofar as Capitol caused the occurrences specified in the issues -- the retransmissions in November 1990, the tones in 1991, the retransmissions in 1992, and the slow Morse code identification (ID) -- it is undeniable that its acts or omissions occurred more than once and continued for more than one day. In its PFCs Capitol argues either that it was not responsible for the violations or that they were not willful and is silent as to repetition. The record shows that Capitol willfully committed operating violations specified in issues a, b, d, e, f and g, and that those issues should be resolved against Capitol. Aside from Capitol's willfulness, however, the repetition in itself of each violation compels the resolution of those issues against Capitol.[3]

6. At p. 2 Capitol states that the Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing, 8 FCC Rcd 6300 (1993) (HDO), in this case was erroneously entered and "this proceeding should be terminated forthwith." The time for reconsideration of the HDO has long since passed. Indeed the

[3] It is actually disingenuous and misleading for Capitol to argue, as it does with reference to issue e, that the issue should be resolved in Capitol's favor on the basis of its claimed lack of willfulness in the face of the undeniable repetition of the Morse code ID violation.

HDO was released August 31, 1993.[4] Furthermore, it is plainly not the province of the Presiding Judge to do so.[5]

7. In ¶¶ 51-54, 97 and 113 Capitol states that RAM's campaign against Capitol, starting with the pleadings[6] against its license application, shows RAM's witnesses are so biased that the Presiding Judge should discount their testimony entirely. We disagree that the testimony of what Capitol terms "RAM-affiliated" witnesses, one of whom, Luke Blatt, is now employed by a competitor of RAM, should be disregarded (Tr. 372, 438-9). We note that RAM's testimony is corroborated by the FCC engineers, who observed the same tones in August 1991 that RAM observed in July 1991, and by documentary evidence, PRB Exs. 16 and 17, of the 1992 selective retransmissions. We must also point out the bias of Capitol's witnesses, including its long time paid consultant Arthur Peters. Finally, even if RAM's witnesses are disregarded entirely, the interference observed by FCC engineers warrants the revocation of all Capitol's licenses and imposition of a forfeiture, and the misrepresentations to the FCC independently warrant the revocation of all Capitol's

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[4]See Section 405(a) of the Communications Act, 47 U.S.C. § 405(a) and Section 1.106(f) of the Commission's Rules, 47 C.F.R. § 1.106(f).

[5] See Section 405(a) of the Communications Act; Section 1.106(a)(1) of the Commission's Rules; and *Atlantic Broadcasting Co. (WUST)*, 5 FCC 2d 717, 720 (1966).

[6] Capitol describes RAM's initial series of pleadings that were rejected when Capitol's PCP license was granted as an abuse of process. Under this theory any pleadings on the losing side are an abuse of process.

licenses.

8. In ¶¶ 57-64 Capitol concedes that, throughout the period it was authorized to operate a PCP station, it did not cooperate and did not attempt to establish a mutually satisfactory channel sharing arrangement. This is an admission of violation of Section 90.173(b) of the Rules, the "Golden Rule" for licensees on shared channels, which requires cooperation. Capitol claims its non-cooperation was warranted because of RAM's complaints that Capitol was causing interference.[7] This is exactly backward. RAM's complaints increased Capitol's duty to cooperate under Section 90.173(b), and Capitol was reminded of this by the FCC's Walker. As noted in the Bureau's Findings ¶ 18, during 1991 RAM and Capitol each complained to Walker about the other and he told them they had to share the channel and to work it out.

9. An example of Capitol's attitude toward cooperation is found in ¶¶ 60-61. Capitol concedes that it promised to dispatch a technician to fix a problem and did not. In fact, the phrase in ¶ 61, "so far as RAM was aware, Capitol had fixed the problem when informed of it" is an instance in which Capitol intentionally misled RAM on this point.

10. In ¶¶ 15, 69 and 107-8 Capitol adverts to its claim, made for the first time at the hearing, that it had not even

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[7] Capitol's admission is summed up in ¶ 63: "Absent RAM's continuing and unrelenting hostility toward Capitol, there is every reason to believe that Capitol would have been reasonably cooperative ... in attempting to establish a mutually satisfactory channel sharing arrangement." (emphasis added).

started operating its PCP at the time of the November 1990 retransmissions. As stated in the Bureau's Findings ¶ 68 and Conclusions ¶ 41, Capitol's 1994 claim that the PCP station was not operating in November 1990 is not believable in light of its contemporaneous response to RAM's November 1990 complaint which did not mention this seemingly conclusive excuse. Additionally, it was not necessary for Capitol to have constructed its PCP station at its authorized sites and placed it into operation to have caused the November 1990 retransmissions of its RCC station.

11. Contrary to Capitol's claim in ¶¶ 15 and 70, based on the opinion of its long time paid consultant Peters (who was not consulted about it at the time), intermodulation is not the most likely explanation for what even Capitol describes as the "stereo" retransmissions during November 1990. See the Bureau's Findings ¶¶ 64 and 69 and Conclusions ¶¶ 41-43. Typically, with intermodulation the listener hears some distortion and likely more than one signal. In FCC engineer Walker's experience, there is always audio distortion (Tr. 1484). Further, as Peters indicated, intermodulation is easy to find with "non-space age techniques" (Tr. 1098). Yet Capitol's only reaction was to deny culpability and accuse RAM of staging the occurrence (Cap. Ex. 11, p. 2). Capitol did not consult Peters and never mentioned <u>any</u> investigation to find the cause of the retransmissions, despite the fact that they involved Capitol's RCC station, and conceivably could have resulted from some malfunction or mischief at the RCC station. Willful interference, not intermodulation,

is the most likely explanation for the November 1990 retransmissions.

12. In ¶¶ 20-23 Capitol discusses alleged interference from RAM during March 1991. Even if true, Capitol's complaints of interference would not justify its own interference. However, this highlights yet another of Capitol's misrepresentations. In ¶ 20 Capitol refers to Cap. Ex. 12, which includes Mike Raymond's March 14, 1991, statement under penalty of perjury submitted to the Commission in response to a complaint from RAM. Raymond states that Capitol started its PCP service on March 12, 1991, and "[s]ince that time and continuing to date, RAM has repeatedly initiated paging transmission while a page by Capitol Paging is in progress" (Cap. Ex. 12, p. 5). In a June 17, 1992, statement under penalty of perjury responding to the FCC's May 19, 1992, letter, Raymond provided a list of the PCP station's first ten customers and their service agreements. The first, Rax Restaurant, signed up March 29, 1991, for service to begin May 1, 1991. The second, Pioneer Home Improvement, signed up April 1, 1991, for service to begin April 1. The third, Rotary Garden Apartments, signed up April 8, for service to begin May 1, 1991 (PRB Ex. 11, pp. 1-2, 9-11). Viewing these representations in the light most favorable to Capitol,[8] Capitol did not start providing service to any customer until April 1, 1991. The claim

[8] As discussed in the Bureau's Findings ¶¶ 44-45 and Conclusions ¶¶ 21-23, Capitol's representations concerning its customers are inconsistent and cannot be relied on. The Bureau does not concede that Capitol had any PCP customers in 1991, or thereafter.

that RAM was interfering with Capitol's pages between March 12 and 14, 1991, is a plain misrepresentation.

13. In ¶¶ 21 and 23 Capitol explains that it believed that PCP stations must limit their transmissions to three minutes and alleged that RAM's transmissions exceeded this limit. After being told at an April 2, 1991, meeting at the FCC that its belief was unfounded, Capitol sought a written ruling in an April 3 letter. The FCC's May 14, 1991, reply stated that PCP systems such as RAM's and Capitol's were not subject to the three minute rule.[9] The letter also reminded RAM and Capitol that "licensees are expected to cooperate fully in the use of shared channels by taking all reasonable precautions not to cause harmful interference to other transmissions and to use the spectrum in an efficient manner" (Cap. Ex. 14, p. 2). Capitol never sought reconsideration of this ruling or appealed it. It is simply too late to do so now. It is also an ineffectual way to accuse RAM of wrongdoing.

14. In ¶ 29 Capitol claims it had few customers in August 1991 because of technical difficulties and interference from RAM. According to Mike Raymond's June 17, 1992, statement under penalty of perjury, the tenth of Capitol's first 10 customers

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[9] This ruling was in accord with a long standing interpretation of Section 90.483(d) of the Commission's Rules, which requires certain licensees of "interconnected" stations to limit transmissions to three minutes. The rule applies where the incoming phone call controls the transmitter and is transmitted directly. This is not the case with paging licensees like RAM and Capitol that use "store and forward" paging terminals which process pages and which control when and how the pages are transmitted.

signed up June 21, 1991 (PRB Ex. 11, pp. 1-2, 18). This does not accord with the idea that hundreds signed up but dropped service due to interference from RAM, thus resulting in only 2 or 3 customers in August.

15. Cap. Ex. 19, a July 19, 1991, FCC internal memo describing a complaint from RAM, was received into evidence not for the truth of what it states but to show that RAM made a complaint (Tr. 1435). In ¶¶ 30-31, however, Capitol refers to Cap. Ex. 19 for the truth of what it states, namely that RAM described interference sounding like a tone page transmission and ascribed it to "paging station testing equipment" that is "patched in to its paging base station" and "is capable of being removed in less than one minute." Capitol then denies it had such equipment. Capitol's bootstrapping should not be countenanced and is actually puzzling. The sounds RAM is said to have heard were the same sounds the Commission's engineers heard. According to the memo, RAM even described a method of producing the tones that seems to be the autotest program of Capitol's paging terminal.

16. In ¶ 32 Capitol misstates the record by diminishing the amount of time the FCC engineers spent monitoring the PCP frequency. Contrary to the suggestion in ¶ 32, the engineers monitored continuously, whenever they were in the car, and they always heard Capitol's tones (Bureau Findings ¶ 20).

17. Capitol's transmissions of tones most definitely were not "legitimate test transmissions," as Capitol claims in ¶ 35,

for the reasons set forth in the Bureau's Findings ¶¶ 20-27, 30-43 and 57; Conclusions ¶¶ 4-10, 13-16, 26-37 and 40; and Ultimate Conclusions ¶ 2. Rather, illegitimate transmissions of fake "tests" during July and August 1991 were a central part of Capitol's illicit business plan to deal with RAM's competition by disrupting its transmissions.

18. In ¶¶ 39-40 Capitol discusses the conversation between FCC engineer Donald Bogert and Raymond about the slow Morse code ID after their telephone conversation with the manufacturer of the paging terminal. Capitol points to part of Bogert's statement, *i.e.*, that the switch seemed to be in the right position, while leaving out the other part, *i.e.*, that whatever the problem was, the speed was still too slow and needed to be corrected. See the Bureau's Findings ¶¶ 28-29. Capitol refers to this as a conflict in the testimony, but Raymond admitted that Bogert told him the Morse code speed was too slow and that he never had someone check it (Tr. 1036, 1354).

19. In ¶ 40 n. 9 and ¶¶ 103-106 Capitol argues that the slow speed was due to good faith reliance on the switch setting. Since it did not know the Morse code was too slow until alerted by the engineers, Capitol continues, the violation was not willful, and issue "e" should be resolved in its favor. The claim of good faith[10] and lack of willfulness is belied by Raymond's failure to correct the Morse code speed until receiving

[10] Contrary to Capitol's claim, the engineers cannot corroborate Capitol's "good faith", nor is there any citation to such corroboration.

a NAL nearly a year after the engineers told him it was too slow. The violation was willful. Also, it is undeniable that it was repeated during August 12-15 and Capitol is silent on this point.[11] The issue must be resolved against Capitol.

20. The Bureau disagrees vehemently with Capitol's claim in ¶ 65 that the *bona fides* of its PCP business venture is overwhelmingly established by the record. See the Bureau's Findings ¶¶ 44-52 and Conclusions ¶¶ 19-25. There is no dispute in the record that Capitol constructed and "operated" its PCP station with borrowed transmitters of inadequate power -- 76 and 100 watts, compared with authorized power of 350 watts -- and that almost a year after its license was granted it had at most two or three customers with one pager each. The record compels the conclusion that the PCP station was not a legitimate business but merely a cover for causing interference to a competitor under the guise of testing.

21. Section 90.403(e) requires licensees on shared channels to "take reasonable precautions to avoid causing harmful interference. This includes monitoring the transmitting frequency for communications in progress and such other measures as may be necessary...." Capitol chose to meet this requirement

[11] In any event, Capitol affirmatively stated, in Raymond's written direct testimony, that it did not contest the Morse code violation (Cap. Ex. 1, p. 24). Capitol is now arguing the point in its PFCs. Obviously, Raymond's admission is preemptive.

with an inhibitor,[12] and it made much of the sound condition of its inhibitor. Notwithstanding Capitol's claim in ¶¶ 18, 78, 99 and 123, however, that there is "no dispute" that its inhibitor was functioning, the FCC engineers observed instances of Capitol commencing to transmit while RAM was still on the air. This result shows either that the inhibitor was not functioning or that Capitol was overriding it in some way. Capitol tries to divert attention from the result by focusing on details of internal wiring, such as how the squelch knob was connected. Whether or not a particular wire was properly connected is irrelevant, because, in fact, the device was not preventing Capitol's interference. The fact that the Commission engineers were not able to determine the reason for Capitol's transmitting over RAM's transmissions is not in Capitol's favor. It merely shows that Capitol was concealing from them the method by which this was done. This conclusion is bolstered by Raymond's disinterest in investigating and correcting whatever caused Capitol to transmit over RAM. When asked to explain the fact that the FCC engineers observed Capitol go on the air while RAM was still on, Raymond's cavalier response was that "if they couldn't figure it out ... don't expect me to figure it out" (Tr. 1340).

22. In ¶¶ 40 and 79 Capitol complains that the engineers

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[12] As discussed in the Bureau's Findings ¶ 9, an inhibitor is a radio receiver tuned to the shared channel that automatically signals its own station not to transmit when the channel is busy.

did not advise it that Capitol was causing interference. There is no requirement in the Communications Act or the Commission's Rules that engineers performing an inspection inform the licensee on the spot of any violations. At any rate, Capitol was well aware of RAM's complaints about its interference.

23. In ¶¶ 80-83 Capitol inappropriately attempts to redefine "willful" in arguing that its transmissions of tones were not willful violations. "Willful" is defined in Section 312(f) of the Communications Act and was thoroughly explicated by the Commission in the HDO at 6302. Capitol's interference was willful. Despite its understandable desire to do so, Capitol cannot redefine "willful" to exculpate itself.

24. We strongly disagree with Capitol's claim in ¶ 83 that the tones were *bona fide* tests. As discussed in the Bureau's Findings ¶¶ 30-43 and Conclusions ¶¶ 4-11 and 13-16, Capitol was given ample opportunity to identify a purpose for the "tests" and any persons who received the tests. Capitol was consistently evasive and could identify no recipient and no purpose, leading to the inescapable conclusion that the only purpose of the tones was to occupy air time and cause interference.

25. In ¶¶ 84 and 100-101 Capitol says that Walker "did not challenge Capitol's evidence"[13] that the tones were good faith tests and that, in any event, his opinion is worth less than Peters', who "testified forcefully that the testing was not

[13] It is not a witness's role to "challenge" evidence but rather to testify as to facts of his knowledge and as to opinions that he is qualified to render.

excessive." Capitol bootstraps Peters' opinion that extensive testing is not necessarily excessive into approval of extensive transmissions of tones with no one to receive them and no purpose for days at a time. Peters never testified that sending out tones with no one to receive them was good faith testing. To the contrary, he said that someone had to go out in the field and wait for pages to occur and count them (Tr. 1144-5). Indeed, the claim that Capitol's practice of transmitting tones around the clock was routine, necessary testing is belied by the fact that the tones stopped during the inspection and were never heard again.

26. Walker has excellent qualifications to give an opinion that the tones were excessive testing. He has been employed with the Commission as a field engineer since 1976 and had never heard such "testing" in his experience. Walker's expertise derives from 18 years of listening to stations' transmissions in the course of his employment as a field engineer.

27. Capitol's argument, made for the first time in its PFCs, that it did not engage in excessive testing, is curious in view of Raymond's written testimony that Capitol does not contest the charge of excessive testing (Cap. Ex. 1, p. 24). See also the statements by Capitol's counsel at hearing (Tr. 180, 1049).

28. In ¶¶ 86-92 Capitol tries to conclude that its tones were not harmful interference. This argument was disposed of in the Bureau's Conclusions ¶¶ 13-14. It is settled law that monopolizing a frequency for prolonged periods with disregard to

others with a right to use the frequency is willful interference.

29. In ¶¶ 88,[14] 90 and 91 Capitol makes the curious argument that its excessive testing and harmful interference should be overlooked because there was some free time left on the channel and because factors internal to a licensee's paging system and the wait for the channel to become free would also cause delays. It is not clear why the delay experienced by a licensee which lives up to its obligation to share by waiting for the channel to become free should be equated with the delay experienced by a licensee that is the victim of interference transmitted by a station that is violating its sharing obligation. Nor is it clear why a violation should be excused because it could have been even worse.

30. Contrary to Capitol's argument in ¶ 92, since no one was receiving Capitol's "tests" and the "tests" had no purpose, all of the "testing" engaged in by Capitol must be held to be excessive and harmful interference.

31. In ¶ 97 Capitol argues that the testimony of RAM witnesses is not credible and therefore there is insufficient evidence to support a finding of violation of Section 90.405(a)(3) of the Commission's Rules in July 1991. The

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[14] In ¶ 88 n. 13 Capitol seems to suggest that RAM should not complain of delay because RAM was accommodating so many customers who wanted voice pagers, rather than digital pagers, which generate a read-out. (An analog voice page takes more time to transmit than a digital page.) We note that Capitol was planning to have exclusively voice pagers on its PCP station and also has voice pagers on its RCC station (Tr. 1329-30, 872). This is a preposterous argument.

testimony of RAM witnesses concerning the tones they heard for days on end is corroborated by the FCC engineers, who observed the same tones very shortly thereafter and conclusively traced them to Capitol. It is also corroborated by Capitol. Not only did Capitol never deny transmitting tones prior to the FCC engineers' visit to Charleston, but Raymond claimed to "test all the time" (Tr. 1312-4).

32. In ¶ 102, n. 15, Capitol argues that if the Presiding Judge finds that Capitol violated [only] Section 90.405(a)(3)(excessive testing) during August 12-15, 1991, a warning letter would be the only appropriate sanction. Capitol reasons that even handed treatment demands this since RAM received a warning letter. Capitol's reasoning is flawed. RAM's July 30, 1992, warning letter refers to Capitol's NAL of the same date and explains the reason for disparate treatment. RAM's two minute timer was interfering only with Capitol's interference (Cap. Ex. 25, pp. 1-2). Significantly, Capitol never sought reconsideration of RAM's warning letter.

33. In ¶¶ 109-118 Capitol claims that it did not cause the selective retransmissions that started in 1992. As discussed in the Bureau's Findings ¶¶ 58-63, 70-73 and Conclusions ¶¶ 44-48, the weight of the evidence shows that Capitol did cause the retransmissions.

34. In ¶ 114 Capitol argues that it would not have engaged in more interference after receiving a NAL, and cites Peters for the proposition that Capitol has "respect" if not "fear" of the

FCC. For the reasons discussed in the Bureau's Findings ¶¶ 64-65 and Conclusions ¶ 48 Capitol's argument is laughable. Capitol never contacted its long time consultant Peters about this or any other interference problem, although, according to Peters, Capitol usually consulted him when it suspected it might not be in compliance with FCC standards (Tr. 1116, 1245). Peters did not even know that Capitol had a PCP station (Tr. 1249). Capitol did not take any other steps to determine the cause of the retransmissions either, despite the fact that its RCC station was involved and an innocent licensee would have been concerned that there was a problem at the RCC station.

35. Capitol's attitude toward the FCC is arrogance, not "respect" or "fear". Capitol knew the Morse code ID was slow and did not fix it for a year after the FCC pointed it out. Capitol knew about RAM's complaints and attended the April 2, 1991, meeting at the FCC, yet by its own admission regularly transmitted tones that consumed 20 seconds of every minute for hours at a time. In line with that attitude, in response to the NAL, Capitol continued its interference, in yet another form.

36. Curiously, in ¶ 116, Capitol argues that the retransmissions were too subtle and ineffective a method of disruption to have been caused by Capitol. This is nothing more than an admission of Capitol's expertise in this area.

37. In ¶¶ 120 and 122 Capitol suggests the FCC ignore instances of misrepresentation and lack of candor under a general misrepresentation/lack of candor issue because they were not

specifically discussed in the body of the HDO. This suggestion is untenable in light of the importance the FCC places on truthfulness from its licensees. It is also contrary to precedent. "It is well established that evidence relevant to the designated issues should not be excluded 'merely because it was not included among the specific instances which warranted the hearing.'"[15] Further, as discussed in the Bureau's Conclusions ¶¶ 18-39, Capitol's misrepresentations and lack of candor were central to its illicit business plan. They include obtaining a PCP license not for the purpose of serving paging customers but for the purpose of disrupting a competitor's legitimate paging business on the same channel; engaging in interference under the guise of "testing;" and attempting to cover its tracks when the Commission sought to investigate the interference and "testing."

38. In ¶ 121 and n. 17 Capitol argues that there was no misrepresentation as to customers and any discrepancies are irrelevant. We disagree. As discussed in the Bureau's Findings ¶¶ 44-47 and Conclusions ¶¶ 18-23 and 25, Capitol did make misrepresentations. Further, the inconsistencies are relevant. Capitol's motive was to hide the fact that its PCP station was a cover for causing interference to a competitor, not a legitimate business.

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[15] *Clay Frank Huntington*, 61 FCC 2d 123, 124 (Rev. Bd. 1976), *citing Chronicle Broadcasting Co.* 20 FCC 2d 33, 39 (1969); *Belk Broadcasting Co. of Florida, Inc.*, 27 FCC 2d 921 (Rev. Bd. 1971); *WPIX, Inc.*, 25 FCC 2d 678 (Rev. Bd. 1970).

Conclusion

39. In sum, Capitol's licenses should be revoked and $95,000 in forfeitures imposed.

Respectfully submitted,

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May 6, 1994

CERTIFICATE OF SERVICE

I, Rosalind M. Bailey, a secretary with the Private Radio Bureau, hereby certify that on this 6th day of May 1994, copies of the foregoing **Private Radio Bureau's Reply to Capitol's Proposed Findings of Fact and Conclusions of Law** were served, by first-class U.S. mail, upon the following:

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